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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

LINCOLN PROPERTY COMPANY, *et al.*,
*Petitioners*,

v.

CHRISTOPHER ROCHE, *et ux.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF AMICI CURIAE FOR THE REAL ESTATE ROUNDTABLE, NATIONAL MULTI HOUSING COUNCIL, AMERICAN HOTEL & LODGING ASSOCIATION, AMERICAN RESORT DEVELOPMENT ASSOCIATION, BUILDING OWNERS AND MANAGERS ASSOCIATION, INSTITUTE OF REAL ESTATE MANAGEMENT, INTERNATIONAL COUNCIL OF SHOPPING CENTERS, NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF HOMEBUILDERS, NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, NATIONAL ASSOCIATION OF REAL ESTATE INVESTMENT TRUSTS, AND NATIONAL ASSOCIATION OF REALTORS IN SUPPORT OF PETITIONERS

STEPHEN M. RENNA
THE REAL ESTATE ROUNDTABLE
1420 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005
(202) 639-8400

BRUCE E. PARMLEY
GREGORY G. GARRE*
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5665

*Counsel of Record

*Counsel for Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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## STATEMENT OF INTEREST OF AMICI CURIAE

This case presents basic jurisdictional issues of exceptional importance to businesses—such as those in the commercial and residential real estate industry—that operate in multiple states through affiliated entities, including limited partnerships.[1] The overriding question concerns the manner in which federal courts should assess a business defendant's citizenship for purposes of establishing diversity jurisdiction. 28 U.S.C. § 1332(a). That question, in turn, governs the ability of business defendants to invoke their right under 28 U.S.C. § 1441(b) to remove an action to a federal forum. That removal right has long played a vital role in ensuring that, where federal jurisdiction exists, non-resident defendants may access federal courts and, more to the point, "a tribunal free from local prejudice." Pet. App. 15a-16a.

Section 1441(b) provides that a case is removable if "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." This case was filed in Virginia state court. The only parties "properly joined and served as defendants" are petitioners Lincoln Property Company (Lincoln), a Texas corporation with its principal place of business in Texas, and State of Wisconsin Investment Board, a Wisconsin entity. It is undisputed that neither defendant is a citizen of Virginia, as are respondents, and that the named parties are therefore diverse pursuant to 28 U.S.C. § 1332(a). Petitioners removed the case from state court to federal court pursuant to Section 1441(b), and the district court entered summary judgment in their favor. Pet. App. 39a, 88a. The Fourth Circuit, however, reversed and remanded with instructions that the case

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[1] Pursuant to this Court's Rule 37.6, amici notes that no part of this brief was authored by counsel for any party, and no person or entity other than amici made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a).

be returned to state court on the ground that defendants had "failed to carry their burden of proof with respect to their allegedly diverse citizenship." *Id.* at 2a.

In at least two critical respects, the Fourth Circuit's decision disrupts the settled framework for determining the citizenship of business defendants. First, the decision instructs courts to look beyond the citizenship of the defendant named in the complaint and to identify non-named affiliates that may destroy diversity under a "real parties in interest" analysis. Pet. App. 14a. Second, the decision instructs courts that the citizenship of a non-named limited partnership may be based on its "nexus" to the state in which the lawsuit is filed, as opposed to the citizenship of its partners. *Id.* at 16a. The decision thus transforms a basic jurisdictional determination into a free-wheeling, fact-intensive inquiry that considers the existence of non-named entities such as limited partnerships and limited liability companies that might have a connection to a named defendant or the events at issue, and then gauges the "nexus" among any such affiliated entities, the parties named in the complaint, and the forum state. For businesses that operate in multiple states through various affiliates, the Fourth Circuit's decision is a recipe for uncertainty and wasteful litigation over a threshold jurisdictional determination made in thousands of cases each year—in the Fourth Circuit alone.

Amici have a direct and substantial interest in the proper resolution of the important jurisdictional issues presented by this case. Amici are The Real Estate Roundtable, National Multi Housing Council, American Hotel & Lodging Association, American Resort Development Association, Building Owners and Managers Association, Institute of Real Estate Management, International Council of Shopping Centers, National Apartment Association, National Association of Homebuilders, National Association of Industrial and Office Properties, National Association of Real Estate Investment Trusts, and National Association of Realtors. Lincoln is a



member of the National Multi Housing Council and the International Council of Shopping Centers. A description of the mission, organization, and activities of each of the amici associations is set forth in the addendum to this brief.

Amici represent a broad spectrum of commercial and residential real estate interests present in virtually every county in America. Amici's members include owners and lessors of commercial property such as office buildings, shopping centers, apartments, industrial and distribution facilities, hotels, and resorts. They also include developers, property managers, brokers, realtors, homebuilders, Real Estate Investment Trusts, financial institutions, investment advisors, and individual and institutional investors. Amici's members routinely operate through separate legal entities including corporate subsidiaries, trusts, limited partnerships, and limited liability companies in conducting operations with respect to different properties in multiple states. The multi-faceted structure of such enterprises is based on legitimate considerations discussed below, and reflects the practical challenges of doing business in the real estate industry.

The Fourth Circuit's decision creates the potential for enormous uncertainty for amici's members with respect to a crucial jurisdictional determination. Even when, as here, a plaintiff has named a business entity as defendant that is undeniably diverse, the Fourth Circuit's decision may require a court to question the existence of diversity jurisdiction and require the defendant to *disprove* a connection between non-named affiliates and the events at issue or the forum state. In addition, the Fourth Circuit's decision creates uncertainty as to the citizenship of limited partnerships and other entities—through which amici's members operate—for purposes of establishing diversity by holding that citizenship may be based on a partnership's purported "nexus" (Pet. App. 16a) to a state rather than the citizenship of its partners. The Fourth Circuit's analysis will increase the costs of removing such suits to federal court by generating collateral litigation over a

threshold jurisdictional determination. Moreover, the Fourth Circuit's decision will create business and investment uncertainty to the extent that it deprives businesses of their statutory right to remove a case to federal court.

The Fourth Circuit's decision has national implications for amici's members. As explained below, the Fourth Circuit's decision conflicts with the decisions of other federal circuits on the jurisdictional issues presented. Because many if not most of amici's members operate in multiple states, the circuit conflicts created and deepened by the Fourth Circuit's decision may subject amici's members to different treatment in different states as to a basic jurisdictional determination. Few jurisdictional issues are more important than the rules that govern the diversity determination, because more than 60,000 diversity cases are litigated each year. *See* Pet. 2. Amici urge this Court to grant the petition and establish uniformity on the important jurisdictional issues presented.

## SUMMARY OF ARGUMENT

The Fourth Circuit's decision holds that, in determining citizenship for purposes of diversity jurisdiction, a court should look beyond the citizenship of a corporate defendant named in the complaint and impose on the defendant a burden to prove that the citizenship of affiliates *not* named in the complaint does not destroy diversity under a factbound and indeterminate "real party in interest" analysis. Applying that analysis, the Fourth Circuit reversed a judgment in favor of petitioners on the merits and ordered that the case be sent back to state court on the ground that one of Lincoln's affiliates—a limited partnership that was not named by plaintiffs as a defendant in the original complaint, added as a defendant in an amended complaint, or joined as a necessary and indispensable party—was the "real party in interest," and that the affiliate would destroy diversity based on its purported "nexus" to Virginia. Pet. App. 16a. As explained in the petition, that decision is fundamentally flawed.



The "real party in interest" concept was designed to inquire into the citizenship or legitimacy of the parties *bringing* the suit and generally has focused on the "nominal or formal parties" named in a complaint. *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 460-461 (1980). The Fourth Circuit's decision dramatically expands that concept by employing it to look *beyond* the "nominal or formal" parties named in the complaint and then obligating a defendant to establish that other entities are not a "real party in interest," even though the plaintiff has not named such entities or sought to join them under Fed. R. Civ. P. 19. The Fourth Circuit's free-ranging "real party in interest" inquiry also conflicts with the terms of the removal statute, which explicitly places the focus on the citizenship of the "parties in interest *properly joined and served* as defendants." 28 U.S.C. § 1441(b) (emphasis added). In short, with no justification, the Fourth Circuit has turned the "real party in interest" concept into a formula for uncertainty and a diversity-destroying engine.

The Fourth Circuit's other holding is equally problematic from the standpoint of the plethora of multi-faceted business enterprises prevalent in today's economy. As this Court recently reaffirmed, the "accepted rule" is that a limited partnership "is a citizen of each state * * * of which any of its partners is a citizen." *Grupo Dataflux* v. *Atlas Global Group LP*, 124 S. Ct. 1920, 1923 (2002). The Fourth Circuit, however, has engrafted onto that straightforward rule a fact-intensive "nexus" element that may destroy diversity if the plaintiff can show that a partnership has a sufficient relationship to a particular state, even if none of its partners are citizens of that state. That kind of inquiry may be appropriate in determining whether a court has *personal* jurisdiction with respect to a limited partnership, but it has no place in the calculation whether *diversity* jurisdiction exists. The Fourth Circuit's decision throws into potential disarray the citizenship of hundreds if not thousands of partnerships that operate or own property in the Fourth Circuit.

The Fourth Circuit's erroneous decision plainly warrants this Court's review. First, the decision will have a disproportionate and recurring impact on an important sector of the American business community—enterprises, like most real estate businesses, that operate in multiple states through affiliated entities. Second, the decision will generate uncertainty—and the litigation risk that comes with uncertainty—over a fundamental jurisdictional question that is likely to arise frequently when an out-of-state entity is sued by an in-state resident in state court. Third, the decision may deprive business defendants of their statutory right to remove a case from state court to federal court, where diversity jurisdiction exists under a correct analysis. Finally, the decision conflicts with the decisions of other circuits on the jurisdictional issues presented, subjecting businesses that operate in multiple states through affiliated entities to different treatment with respect to a fundamental jurisdictional determination.

## ARGUMENT

### I. THE FOURTH CIRCUIT'S DECISION WILL SIGNIFICANTLY IMPACT NUMEROUS BUSINESSES NATIONWIDE, ESPECIALLY THOSE IN THE REAL ESTATE INDUSTRY

The Fourth Circuit's misguided jurisdictional analysis will have a disproportionate impact on an important and widespread sector of the American economy—businesses that operate in multiple states through affiliated entities. As explained below, for legitimate business reasons, many if not most real estate enterprises operate in such a fashion.

1. There are thousands of businesses in the real estate industry across the county. Many of those businesses are affiliated with separate entities that, in turn, provide real estate-related services or own property in multiple states. It is not uncommon for such enterprises to have complex structures, such as Lincoln's. *See* Pet. App. 96a (chart of entities). The Fourth Circuit observed that it found "the



manner in which Lincoln conducts business (using many different structures)" to be "confusi[ng]." *Id.* at 16a n.16; *see id.* at 13a n.11. Moreover, the court appeared to fault Lincoln for its decision to do business through different entities. *See id.* at 14a ("[T]he citizenship of the real parties in interest escapes us because of the confusing structure of the Lincoln group of enterprises"). There is, however, nothing unusual or improper about Lincoln's business structure.

Indeed, real estate companies routinely do business in multiple states through separate entities created for particular properties, projects, or services. These subsidiaries, limited partnerships, and limited liability companies are specifically created to be separate from a parent entity. It is critical that courts respect the separate legal existence of each entity. That is just as true when it comes to determining citizenship for purposes of diversity jurisdiction as it is in making other legal determinations as to such entities. *Cf. United States* v. *Best Foods*, 524 U.S. 51, 61 (1998) ("It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.").

2. It is standard practice in the real estate industry to create a separate legal entity to own, lease, finance, manage, or develop a single property, or to undertake a specific service with respect to multiple properties. This entity is often referred to as a Special Purpose Entity, or SPE, and its "special purpose" is to own, lease, finance, manage, or develop the single asset it holds—the property. In addition, SPEs also are employed in the real estate industry to undertake only a specific service, such as property management, with respect to a number of properties owned by other SPEs.

With respect to a site-specific SPE, the property may be housing, an apartment complex, an office park, a shopping mall, or a resort. Fundamentally, the SPE is an entity that

has no debts or obligations other than those related to the property. A site-specific SPE generally conducts no business other than that relating to the specific property—it does not guarantee or assume the debts of other person or entity, it does not co-mingle funds with those of any other person or entity, and it holds itself out as being a separate legal entity from any other person or entity. *See generally* Steven G. Horowitz, *et al.*, *Use of Single Member Limited Liability Companies in Real Estate Finance Transactions*, Practicing Law Institute, 501 PLI/Real 157 (2004).

By way of example, consider a hypothetical parent corporation that is a property development and management company looking to invest in 50 properties, one in each state across the country, and assume that these properties include urban office buildings, suburban office parks, urban apartment buildings, suburban retail shopping centers, and industrial facilities. The parent entity is likely to set up one separate business entity—be it a limited partnership or a limited liability company—for each of these individual properties. Although the parent will be affiliated with each of the entities, none of the properties will be held directly by the parent. There are at least four primary reasons for utilizing a separate legal entity: financing, flexibility in structure, limitation of liability, and taxation.

*Financing*. Nearly all commercial real estate transactions, like nearly all residential real estate transactions, involve borrowing money from an institutional lender. Today's lenders typically require that the business entity that is developing or managing the property be an SPE with no assets or operations other than the real estate project securing the loan. By requiring that the property be held by an SPE, the institutional lender is better able to assess the risks entailed in making the loan and better able to insure that the



loan's performance will be impacted solely by the quality and operation of the mortgaged property.[2]

An institutional lender providing financing for a suburban retail shopping center can underwrite the loan by analyzing the risks of financing only that shopping center—including the likely business viability, revenue, operating costs, and value based on the geographic location and the particular sector of the real estate market involved. But the lender can analyze and predict with far less certainty the risk of the loan if the lender must attempt to evaluate the potential performance of 49 other properties spread across multiple urban and suburban landscapes and sectors of the real estate market.

Institutional lenders seek individual properties held in isolation from other properties to protect themselves from the potential bankruptcy of any business organization affiliated with the borrower. They do not want the poor performance of any other property owned by the borrower, its sponsors, or its affiliates to have an impact on repayment of their loan. In other words, institutional lenders require that the property they are financing be isolated from any other debts or obligations related to any other asset. A lender that is financing development of an apartment complex in suburban Atlanta,

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[2] Commercial mortgages are increasingly bundled together and sold as commercial mortgage-backed securities in a national market to private investors nationwide. The credit rating for such securitized loans is based primarily, if not solely, on the property involved, not the creditworthiness of the borrowers. SPEs are used to reduce the risks inherent in commercial real estate. *See generally* Kathleen O. McKune, *Special Purpose Entities—Who, What, Why, Where, When, and How?*, Practical Real Estate Lawyer, 20 No. 6 Prac. Real Estate Law 7 (2004); *Legal Critera for U.S. Structured Finance Transactions*, Standard & Poor's, ch.3 (2004). For example, some rating agencies will make commercial mortgaged-backed loans only if the property owner agrees to limit its obligations to the single property. *See* Alvin L. Arnold *et al.*, *Construction & Development Financing* § 5:45.50 (3d ed. 2004).

or a tract of single-family homes in Denver, for example, requires that its financing not be used toward the management of an office building in Manhattan. By requiring use of an SPE, banks can insulate their loan from dependence on the success or failure of other properties.[3]

*Flexibility*. Utilizing SPEs with respect to different properties provides real estate businesses with needed flexibility as well. A real estate company is often not the only entity involved in a real estate venture, but rather partners with different investors on a property-by-property basis. These investors have an interest in a specific property—the one in which they invested. Holding the property in an SPE is the most appropriate way to provide these investors with an ownership interest that reflects their investment. For example, an investor who contributes 25 percent of the equity requirement of an office park in suburban Chicago wants a legal structure that holds the office park in a manner that reflects his interest. If the property is held by a parent entity, along with other properties in which the investor has no interest, the structure will not reflect the investor's actual contribution and may increase the risk of his investment.

*Limitation of Liability*. Real estate entities also use SPEs to limit liability to that business entity's assets. The investor described above who is willing to invest in a suburban office park or apartment complex in one state wants to avoid any potential liability for a tenant dispute or property damage claim in a retail shopping center in another state with which

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[3] The concept of structurally isolating the legal ownership of an asset through an SPE is known as being "bankruptcy-remote" and protects lenders against "substantive consolidation," a judge-made doctrine that allows the bankruptcy court to treat multiple entities as a single debtor. *See generally* Richard D. Jones, *et al.*, *Practical Advice on the Preparation of the Substantive Non-Consolidation Opinion in Real Estate Transactions*, American Law Institute, SHO96 ALI-ABA 469 (2003).



the investor has no involvement and contributed no investment. By creating SPEs that hold single assets, the parent and its transaction partners or affiliates may avoid the risk of preexisting liabilities and insulate each property from liability problems involving other property. Real estate investors are particularly concerned about potential uninsured property liabilities such as tenant failures or environmental hazards.

*Taxation*. Nearly all states impose taxes for carrying on or doing business in that state. If all 50 of the properties in the hypothetical example above were held together by one corporation or one unincorporated entity, each state would make its own calculation of the proper allotment of net income from all 50 properties to that state—rather than taxing precisely the business that was done in that state. *See, e.g.*, *Ford Motor Co.* v. *Beaucham*, 308 U.S. 331, 335 (1939) (state tax for privilege of doing business in state can be based on net income and is not limited to income from business within that state); *Reuters Ltd.* v. *Tax Appeals Tribunal*, 623 N.E.2d 1145, 1147 (N.Y. 1993) (international corporation doing business in 80 countries required to pay New York corporate franchise tax based on apportionment of worldwide net income), *cert. denied*, 512 U.S. 1235 (1994). By using separate business entities to conduct and carry on business in separate states, real estate companies may simplify their tax assessment administration and, at the same time, more fairly and accurately allocate their tax liability.

The successful functioning of the real estate industry—one of the largest sectors of the United States economy—is dependent in large measure on giving effect to these separate business structures, which may take the form of limited liability companies, trusts, or limited partnerships. Moreover, the proper functioning of that market is key to the stability of growing financial markets for commercial mortgage-backed securities and Real Estate Investment Trusts.

## II. THE FOURTH CIRCUIT'S DECISION WILL FOSTER UNCERTAINTY FOR NUMEROUS BUSINESSES WITH RESPECT TO A CRUCIAL JURISDICTIONAL DETERMINATION

The Fourth Circuit's decision will generate uncertainty for the hundreds, if not thousands, of real estate firms that operate in multiple states through affiliated entities concerning the fundamental jurisdictional question whether diversity jurisdiction exists and the related—and equally important—question whether a case is removable to federal court.

1. As this Court recently emphasized, "[u]ncertainty regarding the question of jurisdiction is particularly undesirable, and collateral litigation on the point particularly wasteful." *Grupo Dataflux*, 124 S. Ct. at 1930; *see also Grubart* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) (jurisdictional rules should not depend on fact-specific inquires that are "hard to apply," "jettison[] relative predictability for the open-ended rough-and-tumble of factors," and "invite[] complex argument in a trial court and a virtually inevitable appeal"); *Burnham* v. *Superior Court of Cal.*, 495 U.S. 604, 626 (1990) (plurality opinion) (jurisdictional rules have long been designed "to avoid * * * uncertainty and litigation over the preliminary issue of the forum's competence"); *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring). The Fourth Circuit's decision creates uncertainty over a basic jurisdictional determination that is undertaken by federal courts thousands of times each year. Uncertainty leads to business risks which create new costs. Lenders, investors, and other market participants in the real estate industry accordingly abhor unnecessary risks.

2. The stark contrast between the district court's diversity analysis and the Fourth Circuit's analysis underscores the uncertainty that is likely to be fostered by the decision below. The district court's jurisdictional inquiry was clear and straightforward. The court looked to the complaint and determined the citizenship of the defendants that respon-



dents—Virginia citizens—had chosen to sue. *See* Pet. App. 84a-85a, 87a-88a, 92a-93a. They sued Lincoln, which is indisputably a Texas citizen, because it is a Texas corporation with its principal place of business in Texas. *See Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. 497, 558 (1844); 28 U.S.C. § 1332(c)(1) (citizenship of corporation is the place of incorporation and its principal place of business). Respondents also sued State of Wisconsin Investment Board, a Wisconsin entity. Based on the citizenship of the parties named in the complaint, diversity undeniably exists.[4]

By contrast, the Fourth Circuit held that "the citizenship of the nominal parties listed on the Complaint is in *no way* dispositive of subject matter jurisdiction." Pet. App. 17a (emphasis added). Thus, although the Fourth Circuit did not question that diversity exists with respect to the parties named in the complaint, the court held that it was necessary to look beyond the defendants named in the complaint and to ascertain the citizenship of any purported "real parties in interest." *Id.* at 14a. In applying that analysis, the court attempted to canvass Lincoln's business affiliates and ascertain how they were related to the action. *Id.* at 11a-14a. The court openly acknowledged that it had difficulty in understanding Lincoln's business structure and described it as "confusing." *Id.* at 14a; *see id.* at 13a n.11. The court ultimately faulted Lincoln for "the confusing structure of the

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[4] In addressing respondents' post-judgment motion for remand, the district court also considered the citizenship of one of Lincoln's affiliates, EQR/Lincoln Limited Partnership (EQR). The district court found that EQR is a citizen of Texas, because its partners are citizens of Texas. *See* Pet. App. 87a-88a, 92a-93a; *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 192-193 (1990), discussed *infra*. The district court did not hold that it was *necessary* to consider the citizenship of EQR in determining whether diversity exists. But in disposing of respondents' motion, it simply explained that jurisdiction would exist "even assuming" that EQR had been named as a defendant. Pet. App. 88a.

Lincoln group of enterprises," *id.* at 14a, and for failing to disprove that an affiliate was not a real party in interest.

The Fourth Circuit focused on EQR/Lincoln Limited Partnership (EQR), a Lincoln affiliate that was not named as a defendant. As the district court explained, EQR is formed in Delaware and is a Texas citizen for purposes of determining diversity jurisdiction because its partners are Texas citizens. Pet. App. 87a-88a; *see* note 4, *supra*. The Fourth Circuit acknowledged that EQR's listed partners are Texas citizens and that the record does not establish that any EQR partner is a citizen of Virginia. *See* Pet. App. 12a-13a. Nonetheless, the Fourth Circuit held that EQR was a "real and substantial party in interest" based on EQR's activities in managing the apartment complex where respondents lived; that EQR effectively must be regarded as a citizen of Virginia because "it owns land and operates a substantial part of its business in Virginia, thus establishing a very close nexus with the Commonwealth"; that EQR would destroy "complete diversity" if the action had been "maintained" against it or EQR had been "joined"; and that the case therefore "should be remanded" to state court. *Id.* at 16a-17a.

3. The Fourth Circuit's jurisdictional analysis is the antithesis of a clear and predictable rule. Under the Fourth Circuit's analysis, a business defendant with multiple affiliates cannot be assured that the citizenship determination will be based on its own legal citizenship. Instead, the defendant may be asked to prove that one of its affiliates is *not* a real party in interest to the case, even though the affiliate was not named as a defendant. The "real party in interest" inquiry is inherently fact-bound and indeterminate. For example, in this case, the Fourth Circuit demanded "evidence" concerning whether, or to what extent, non-named affiliates "are distinct or uninvolved" in the "business enterprises" of the named defendant and "property holdings." Pet. App. 11a. The Fourth Circuit's analysis also makes federal judges—including appellate judges—responsible for unraveling



complex business structures. The upshot is that a business defendant may not predict with any certainty whether it will be able to establish diversity, and thus will not be able to predict whether a case is removable from state court to federal court. In addition, federal courts will be required to make potentially complex factual determinations just to determine whether a case is removable in the first place.

The Fourth Circuit's analysis of the citizenship of EQR—the non-named affiliate that the court deemed to be "the real party in interest"—will generate uncertainty as to the citizenship of limited partnerships for diversity purposes. The "accepted rule" is that a limited partnership (or partnership) "is a citizen of each state or foreign country of which any of its partners is a citizen." *Grupo Dataflux*, 124 S. Ct. at 1923 (citing *Carden* v. *Arkoma Assocs.*, 494 U.S. 185, 192-195 (1990)). The Fourth Circuit, however, did not base its determination that EQR destroyed diversity on the citizenship of EQR's partners (which are Texas citizens, *see* note 4, *supra*), but rather on its finding that EQR has "a very close nexus with the Commonwealth, which is much stronger than any nexus to Texas made apparent by the record." Pet. App. 16a. That ruling creates great uncertainty for limited partnerships (and similar business entities) that have a presence in the Fourth Circuit. Such limited partnerships, many of which are engaged in the real estate business, no longer can assume that they can establish diversity based on the citizenship of their partners and, instead, are left to guess as to whether a court will find that their purported "nexus" with a particular state destroys (or creates) diversity.

The uncertainty created by the Fourth Circuit analysis will generate "wasteful" (*Grupo Dataflux*, 124 S. Ct. at 1920) litigation. In this case, for example, respondents sued Lincoln because its trade name was used in connection with the management of the property underlying the suit. Pet. 11. Lincoln answered the complaint fully prepared to satisfy any award against it, removed the case to federal court based on

the diversity of the parties named in the complaint, and litigated the case to a judgment in its favor. Yet, on appeal, the federal courts determined—for the first time—that a non-named affiliate of Lincoln was the "real party in interest," and that affiliate was a citizen of Virginia based on its "nexus" to the state. Even though the plaintiffs had not named the affiliate as a defendant, or even attempted to join the affiliate as a party, the Fourth Circuit reversed the judgment in respondents favor and ordered that the case be remanded to state court for the litigation to begin over again.

## III. THE FOURTH CIRCUIT'S DECISION WILL IMPROPERLY DEPRIVE BUSINESSES OF THEIR STATUTORY RIGHT TO REMOVE A SUIT TO AN IMPARTIAL FEDERAL FORUM

The Fourth Circuit's decision creates a diversity-destroying rule that will improperly deprive business defendants of their statutory right to remove a case to federal court where diversity jurisdiction properly exists if they cannot establish diversity under the Fourth Circuit's open-ended analysis.

Diversity jurisdiction has been a fundamental component of federal court jurisdiction since the founding, *see* U.S. Const. art. III, § 2; Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78, and serves a vital policy objective. As this Court has explained, "the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views." *Great So. Fire Proof Hotel Co.* v. *Jones*, 193 U.S. 532, 544 (1904); *see also* 6A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1556, at 422 (1990) ("basic purpose of diversity jurisdiction is thought to be the protection of out-of-state parties from the possible prejudice of local courts").

Moreover, when a plaintiff files an action in state court over which the federal courts would have diversity jurisdiction, defendants have a statutory right to remove the action to federal court, as long as "none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought." 28 U.S.C. § 1441(b); *see Catapillar, Inc.* v. *Lewis*, 519 U.S. 61, 68 (1996). As this Court recognized long ago, "[t]he right of choosing an impartial tribunal is a privilege of no small practical importance." *Marshall* v. *Baltimore & Ohio R.R.*, 57 U.S. 314, 329 (1853). Indeed, thousands of out-of-state defendants choose to exercise that right each year and remove state actions to federal courts in order to obtain a potentially more impartial forum. In 2003, more than 44,000 cases were removed from state court to federal court (considering all bases of jurisdiction). *Judicial Business of the United States Courts 2003*, Table S-7 (*available at* www.uscourts.gov/judbus2003/tables/s7.pdf). Out-of-state businesses, in particular, are often concerned that they may experience local prejudices by being forced to litigate in a foreign state court.

The Fourth Circuit's decision may improperly deprive out-of-state businesses of their statutory right to remove cases to federal court where diversity jurisdiction exists. Indeed, in this case, Lincoln removed the action to federal court based on the diversity of citizenship among the parties named in the complaint and obtained a judgment in its favor in the district court. But the Fourth Circuit reversed that judgment and ordered that the case be sent back to state court based on the application of its misguided "real party in interest" analysis and its conclusion that Lincoln had failed to prove that EQR—a non-named affiliate—was *not* a "real party in interest" that would destroy jurisdiction if it had been sued. Moreover, the Fourth Circuit concluded that EQR, a limited partnership, was a Virginia citizen based on its purported "nexus" to Virginia, even though none of its partners is a citizen of Virginia. That analysis could deprive limited partnerships in the real estate business of their right to

remove a case to federal court in any state in which the partnership owns, leases, manages, or is developing property.

Because they operate through many entities—including limited partnerships—in different states, real estate businesses will be disproportionately penalized under the Fourth Circuit's rule. The decision below creates a potential diversity-destroying engine for such entities and thus may deprive businesses of their right to seek an impartial federal forum.

## IV. THIS COURT'S REVIEW IS NEEDED TO ESTABLISH NATIONAL UNIFORMITY ON THE JURISDICTIONAL QUESTIONS PRESENTED

As explained in the petition, the Fourth Circuit's decision implicates two circuit conflicts over the proper approach for determining "citizenship" for purposes of establishing diversity jurisdiction. First, the Fourth Circuit's decision deepens an existing conflict over whether courts may look beyond the named defendants to determine whether a different entity would destroy diversity under a "real party in interest" analysis. The Fourth and Seventh Circuits embrace such analysis. *See, e.g., Indiana Gas Co.* v. *Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998), *cert. denied*, 525 U.S. 931 (1998). By contrast, the Eighth and Tenth Circuits have confined the "real party in interest" analysis to determining the citizenship of the party pursuing the action, and the Second, Third, Fifth, and Sixth Circuits have held that courts should not apply the "real party in interest" concept to non-named defendants for the purpose of destroying diversity.[5]

[5] *See, e.g., E.R. Squibb & Sons, Inc.* v. *Accident & Cas. Ins. Co.*, 160 F.3d 925, 939 (2d Cir. 1998); *Chemical Leaman Tank Lines, Inc.* v. *Aetna Cas. & Sur. Co.*, 177 F.3d 210, 223 & n.16 (3d Cir. 1999); *Corfield* v. *Dallas Glen Hills LP*, 355 F.3d 853, 864 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2421 (2004); *Certain Interested Underwriters at Lloyd's* v. *Layne*, 26 F.3d 39, 43 (6th Cir. 1994); *Consul General* v. *Bill's Rentals, Inc.*, 330 F.3d 1041, 1045 (8th Cir. 2003); *Esposito* v. *United States*, 368 F.3d 1271, 1273 (10th Cir. 2004).



Second, the Fourth Circuit's decision creates a conflict over the application of the rule established by *Carden* and reaffirmed in *Grupo Dataflux* that the citizenship of a limited partnership is governed by the citizenship of its partners. As discussed above, the Fourth Circuit reasoned that the "nexus" between a limited partnership and a state may be sufficient to destroy diversity—regardless of whether the citizenship of the partners is diverse. Pet. App. 16a. The First, Second, and District of Columbia Circuits, however, have refused to determine the citizenship of a partnership based on its activities and instead have limited that inquiry to the citizenship of its partners. *See Taber Partners* v. *Merit Builders, Inc.*, 987 F.2d 57, 63 (1st Cir. 1993); *ConnTech Dev. Co.* v. *University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 681 (2d Cir. 1996); *Anchorage-Hynning & Co.* v. *Moringiello*, 697 F.2d 356, 357 n.1 (D.C. Cir. 1983) (per curiam).

The resolution of circuit splits is particularly important when it comes to jurisdictional rules. Diversity jurisdiction offers an important gateway to the federal courts and is invoked by businesses and individuals tens of thousands of times each year. *See* Pet. 2. The threshold for establishing diversity of citizenship should be the same in every federal court and should be based on clear and predictable rules. The conflicts that are implicated by the decision below directly impact the thousands of real estate and management businesses nationwide that operate in multiple states through various affiliates. These enterprises are now subject to different rules and potentially different outcomes with respect to a critical jurisdictional determination. The Court should grant certiorari and establish national uniformity on the important jurisdictional questions presented.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

STEPHEN M. RENNA
THE REAL ESTATE ROUNDTABLE
1420 New York Avenue, N.W.
Suite 1100
Washington, D.C. 20005
(202) 639-8400

*Counsel of Record

BRUCE E. PARMLEY
GREGORY G. GARRE*
JESSICA L. ELLSWORTH
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5665

*Counsel for Amici Curiae*

# ADDENDUM

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## DESCRIPTION OF AMICI CURIAE

**American Hotel & Lodging Association.** The American Hotel & Lodging Association (AH&LA) is a dual membership association of state and city partner lodging associations throughout the United States. AH&LA was established in 1911 and is based in Washington, D.C. AH&LA has some 10,000 property members nationwide, representing more than 1.4 million guest rooms. It provides members with advocacy on Capitol Hill, research and information on the lodging industry, and other services designed to ensure a positive business climate for the U.S. lodging industry.

**American Resort Development Association.** The American Resort Development Association (ARDA) is a Washington, D.C.-based trade association representing the vacation ownership and resort development industries. The ARDA was established in 1969 as the American Land Development Association and today has nearly 1000 members, ranging from privately held companies to major corporations, which are located and do business in the United States and overseas.

**Building Owners and Managers Association.** The Building Owners and Managers Association (BOMA) International is an international federation of 108 local associations. BOMA International's 19,000 members own or manage more than nine billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.

**Institute of Real Estate Management.** The Institute of Real Estate Management (IREM) has been the source for education, resources, information and membership for real estate management professionals for more than 70 years. IREM is an affiliate of the National Association of Realtors

and is the only professional real estate management association serving both the multi-family and commercial real estate sectors. The IREM has 82 chapters in the United States as well as eight international chapters. IREM serves as an advocate on issues affecting the real estate management industry. Membership includes nearly 16,000 individual members and 530 corporate members. Collectively, IREM's members manage more than 6.5 billion square feet of commercial space and more than 13 million residential units, totaling more than $848.2 billion in real estate assets.

**International Council of Shopping Centers.** The International Council of Shopping Centers (ICSC) is a global trade association representing the interests of the shopping center industry. The ISC was founded in 1957 and has more than 50,000 members in the United States and elsewhere around the world representing owners, developers, retailers, lenders, and other professionals. Nearly 45,000 of the ICSC's members are in the United States and represent nearly all the 46,990 shopping centers in the United States.

**National Association of Homebuilders.** The National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association representing more than 220,000 members involved in home building, remodeling, multi-family construction, property management, subcontracting, design, housing finance, building product manufacturing and other aspects of residential and light commercial construction. The NAHB is affiliated with more than 800 state and local home builders associations around the country. NAHB's builder members constructed about 80 percent of the more than 1.77 million new housing units in 2004.

**National Association of Industrial and Office Properties.** The National Association of Industrial and Office Properties (NAIOP) is the nation's leading trade association for developers, owners, investors and asset managers in industrial, office, and related commercial real estate. NAIOP



was founded in 1967 and is comprised of more than 12,000 members in 50 North American chapters. It provides networking opportunities, educational programs, research on trends and innovations and strong legislative representation.

**National Association of Real Estate Investment Trusts.** The National Association of Real Estate Investment Trusts (NAREIT) is the national trade association for REITs and publicly traded real estate companies with a combined market capitalization of about $294 billion. Members are real estate investment trusts (REITs) and other business entities that own, operate, and finance income-producing real estate, as well as firms and individuals who advise, study, and service those businesses. NAREIT's principal mission is to communicate about REITs and real estate investment to members, policymakers nationwide, the investment community, the media, and the public. NAREIT regularly represents the REIT and real estate investment community before Congress and the Executive Branch, provides research on the REIT industry, and publishes information about REITs.

**National Association of Realtors.** The National Association of Realtors (NAR) is a non-profit association that represents more than one million members engaged nationwide in all phases of the real estate business, including brokerage, appraising, management, and counseling. NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. NAR's members contribute to such activities as safeguarding real property rights, promoting equal opportunity in housing, real estate licensing, neighborhood revitalization, and public service, and promoting cultural diversity.

**National Multi Housing Council and the National Apartment Association.** The National Multi Housing Council and the National Apartment Association (NMHC and NAA) represent the nation's leading firms participating

in the multi-family rental housing industry. The combined memberships of NHMC and NAA are engaged in all aspects of the apartment industry, including ownership, development, management, and finance. The NMHC represents the principal officers of the apartment industry's largest and most prominent firms. The NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. The NAA is the largest national federation of state and local apartment associations and is comprised of 164 affiliates and represents more than 31,505 professionals who own and manage more than five million apartments across the country. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

**The Real Estate Roundtable.** The Real Estate Roundtable (Roundtable) is a federal policy organization comprised of real estate industry leaders. Its members are the Chairmen, Presidents, and CEOs of the nation's 100 leading commercial and multifamily firms, and the Managing Directors of major financial institutions. The Roundtable also includes the elected leaders and executive directors of major real estate trade organizations. The Roundtable serves as the vehicle through which industry leaders come together to identify, analyze, and advocate policy positions on issues important to the national real estate community. The Roundtable's business and trade association leaders work collectively to ensure a cohesive industry voice is heard by government officials and the public about relevant real estate policies. Collectively, Roundtable members hold portfolios containing over 2.5 billion square feet of developed property valued at more than $250 billion. Participating trade associations represent more than one million people involved in virtually every aspect of the real estate business.